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FILE COPY

December 14, 2005

Chief Justice Ronald M. George
Associate Justices Baxter, Chin,
Kennard, Moreno & Werdeger
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-7303

Re: Request for Depublication
Gattuso v. Harte-Hanks Shoppers, Inc.
B172647, Second Appellate District, Division One

Dear Honorable Justices:

This letter is written under rule 979(a), California Rules of Court, requesting depublication by the Supreme Court of *Gattuso v. Harte-Hanks Shoppers, Inc.*, B167037, (2005) 133 Cal.App.4th 985 (*Gattuso*). I periodically review and compile the State's published body of class action law as the author of *Cohelan on California Class Actions* (The Expert Series) (Thompson-West 2005), a yearly-updated procedural guide for practitioners published since 1997. This role necessitates this depublication request to prevent likely confusion in the case law following *Gattuso's* apparent unreasoned departure from established class action procedure. Established principles are undermined by this decision. Consistency compels depublication.

Without reasoning or citation to authority, *Gattuso* treats the issues of "community of interest" and "typicality" in a manner contrary to well-accepted principles established in published cases from this Court and the California Courts of Appeal. If left as a published opinion, *Gattuso* threatens to contradict decades of solid case law on these issues.

The Court of Appeal, in discussing the community of interest requirement, confused individualized damage questions that do not defeat class certification for individualized liability questions thereby undermining established notions of

"predominance." Next, the discussion of the "typicality" requirement for class certification applies an incorrect legal standard and sets out an incorrect statement of law and application of fact that implicates the potential for improper ex parte contact between counsel and putative class members and promotes misuse of their testimony as a means of defeating class certification. Moreover it sanctions the concept of minority hostility to certification, a principle rejected since 1957 in *Fanucchi v. Coberly-West Co.* (1957) 151 Cal.App.2d 72, 82 confirmed by this Court in *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 472-475 (*Richmond*).

FACTS AND PROCEDURAL HISTORY

Gattuso affirms a ruling of law regarding the reimbursement of employee expenses under Labor Code section 2802 and denying class certification. Employees brought a putative class action against their employer for reimbursement of automobile expenses incurred in discharging their employment duties. The trial court found that defendant's alleged policy of paying increased compensation to certain employees for the purpose of covering expenses did not violate Labor Code section 2804, which prohibits contracts which waive the requirements of Labor Code section 2802 requiring expense reimbursement. The trial court also denied class certification. It found that plaintiff failed to establish common questions of law and fact because individualized inquiry was necessary to determine whether there was a meeting of the minds regarding the manner of expense reimbursement and whether the compensation was sufficient to reimburse expenses. The court determined that the claim of one of the class representatives was not "typical" of the putative class members because he was compensated differently than some of them. *Gattuso*, 133 Cal.App.4th at p. 992.

The Court of Appeal affirmed both rulings. The court disposed of the "community of interest" questions regarding the predominance of common questions of law or fact in a single paragraph bereft of case law support:

> Plaintiffs do not discuss the issue of whether they can meet the community of interest requirement under the trial court's and our interpretation of section 2802. Under that interpretation, the issue is whether Harte-Hanks has increased compensation sufficient to indemnify the OSR's for their automobile expenses within the meaning of section 2802. The trial court reasonably concluded that a resolution of this issue entails an

> individualized inquiry with respect to each OSR. Plaintiffs do not establish that this conclusion is not supported by substantial evidence.

Gattuso, 133 Cal.App.4th at p. 998.

The court's discussion of "typicality" is similarly abbreviated:

> With respect to the issue of typicality, plaintiffs argue that there is a strong identity of interest between them and the class, but the record is replete with evidence showing that there is disagreement between the named plaintiffs and potential class members over the instant lawsuit. Many of the potential class members do not believe they are harmed by Harte-Hanks's policy of paying increased compensation to cover automobile expenses. And the circumstances of the two plaintiffs are not typical of the majority of the OSR's. Accordingly, substantial evidence supports the trial court's finding that the plaintiffs' claims are not typical of those of the class.

Id.

THE COURT'S CONFUSION REGARDING INDIVIDUALIZED DAMAGE INQUIRIES CREATES AN ERRONEOUS, NEW LEGAL STANDARD THAT SUPPORTS DEPUBLICATION

According to the Court of Appeal, the community of interest issue turns on "whether Harte-Hanks has increased compensation sufficient to indemnify the OSR's for their automobile expenses within the meaning of section 2802. The trial court reasonably concluded that a resolution of this issue entails an individualized inquiry with respect to each OSR." *Gattuso*, 133 Cal.App.4th at p. 998. This statement displays a misunderstanding of the difference between individualized liability issues that may defeat certification and individualized damages issues that do not.

In fact, the only individualized inquiry under this analysis is whether the amount of compensation each putative class member received covered the amount of expenses he or she incurred. In other words, whether the differential in weekly pay between

employees whose compensation purportedly included additional amounts for expense reimbursement and pay provided without such additional sums was sufficient to repay the amounts expended for automobile expenses. To reach a conclusion, the trier of fact would only require information as to the amounts incurred and the amount paid for each class member. Disposition of this inquiry requires nothing more than a calculator. It is the type of pure damage calculation, individual to each class member, that is part of the post-certification damages phase of litigation, long held by this Court and others not to defeat certification. See, e.g., *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 809, ["that each member of the class must prove his separate claim to a portion of any recovery by the class is only one factor to be considered in determining whether a class action is proper"; *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 334-335 ["individualized proof of damages is not per se an obstacle to class treatment"]; *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 742-743 ["the necessity for an individual determination of damages does not weigh against class certification"] ; *Clothesrigger, Inc. v. GTE Corp.* (1987) 191 Cal.App.3d 605, 611 ["the necessity for class members to prove their own damages does not mean individual fact questions predominate"].

Accordingly, the court applies an incorrect legal standard on the community of interest issue, compounding its error with a defective application of the facts. (*Sav-on, supra*, 34 Cal.4th at pp. 326-327.) The opinion should thus be depublished.

THE APPLICATION OF AN IMPROPER STANDARD FOR "TYPICALITY" WARRANTS DEPUBLICATION

Gattuso's determination that the class representative's claims were not typical of the class hinged on evidence of "disagreement" between the named plaintiff and potential class members. Said the court, "Many of the potential class members do not believe they are harmed by Harte-Hanks's policy of paying increased compensation to cover automobile expenses." Notwithstanding the questionable veracity of such assertions, this has never been the standard for assessing "typicality" in California class cases. *Gattuso* cites no authority for its typicality standard. The accepted standard is far different than that *Gattuso* announces.

Courts have broadly defined typicality. A class representative's claims are typical when they are "sufficiently similar" to other class members. *Daniels v. Centennial Group,*

wishing to appear loyal may unwittingly be steered toward contributing evidence contrary to their self-interests and that of the class.

The uncritical inclusion of this incorrect legal standard carries the potential of adversely affecting ongoing and future class actions statewide. The practical result is to threaten virtually any proposed or certified class action pending. The ability to defeat certification or to obtain a decertification order with improper legal conclusions based on ex parte communication with a single putative class member who does not want to go along with a class action will effectively defeat the class action vehicle in many cases in which its use would be wholly appropriate.

A trial court ruling on class certification will not be disturbed "unless (1) improper criteria were used; or (2) erroneous legal assumptions were made." (*Sav-on*, *supra*, 34 Cal.4th at pp. 326-327.) *Gattuso's* analysis of the "typicality" issue suffers from both these flaws and supports depublication.

DEPUBLICATION IS NECESSARY TO PREVENT THE CLASS ACTION COUNSEL FROM USING THE OPINION AS THE BASIS FOR IMPROPER CONTACT WITH PUTATIVE CLASS MEMBERS

Gattuso's reliance on declarations obtained by the defendant employer from employee putative class members asserting their "disagreement" with the class claims also implicates the potential for improper contact between counsel and putative class members in the employment context. Rule 3-600(D) of the Rules of Professional Conduct states as follows:

> In dealing with an organizations directors, officers, employees, members, shareholders, or other constituents, a member shall explain the identity of the client for whom the member acts, whenever it is or becomes apparent that the organization's interests are or may become adverse to those of the constituent(s) with whom the member is dealing. The member shall not mislead such a constituent into believing that the constituent may confidential information to the member in a way that will not be used in the organization's interest if that is or becomes adverse to the constituent.

Inc. (1993) 16 Cal.App.4th 467, 473. Further, the typicality requirement focuses on the representative's claims as they relate to *defendant's conduct and activities*. *Classen v. Weller* (1983) 145 Cal.App.3d 27, 46. The standard is not whether someone who, prior to receiving an objectively-worded class notice, "disagrees" with the lawsuit or does not "believe" they have been harmed. Regardless of what a putative class member believes, the question is whether the members of the proposed class "have suffered the same or similar damage." *Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644, 664.

Richmond v. Dart Industries, Inc., supra, contains an extensive discussion of why hostility or antagonism to the class does not defeat certification. A questionnaire showing 6% of a class of 4,000 persons antagonistic to the class suit reflected a "small number" not sufficient to defeat the motion. *Richmond*, 29 Cal.3d at p. 475. This Court found that the trial court can accommodate differing viewpoints by allowing intervention or defining subclasses (in addition to permitting those who "disagree" to opt out of the class). "Even if differences among class members are more fundamental, having to do with the type of relief which should be sought or indeed with whether the class opponent ought to be held liable at all, judicial accommodation appears to provide a sufficient mechanism for the protection of absentee interests." *Id.* at pp. 473-474. Most importantly, this Court acknowledged the necessity for a true assessment of hostility or antagonism following the class notice process: "It should also be noted that the trial court will be in a better position to assess the true feelings of the class after court-approved, objectively worded notice is sent to the entire class and the absent members are given an opportunity to elect nonparticipation in this lawsuit." *Id.* at p. 475, fn. 10.

In *Fanucchi v. Coberly-West, Co., supra*, the court held that even though one-third of the proposed class signed affidavits stating that they did not wish to be a part of the class, the class action suit could not be barred. "If [the opponents of the class] do not want to be paid they need not claim their share of any recovery which may result, but they may not thus defeat the right of the remaining growers to maintain a class action. . . ." *Fanucchi v. Coberly-West, Co., supra*, 151 Cal.App.2d at p.82; see, also, *Cohelan on California Class Actions* (2005 ed.) § 4.22, pp. 56-57.

The new standard set forth by *Gattuso* creates the unintended consequence of broad possibilities for abuse. Counsel defending a certification motion are guided to pit class members' interests against one another. They may engage in ex parte communications with putative class members in an effort to obtain declarations from them stating that they disagree with the class representative's claims or don't believe they have a similar claim. These are legal conclusions most lay witnesses are not competent to testify to. Employees

There is nothing in the *Gattuso* opinion indicating that counsel soliciting "disagreement" declarations from putative class member employees explained that such statements may have been adverse to the employees' own interests in recovering expense reimbursements through the litigation. Depublication will remove the incentive for such potential abuses occurring as a common course in defending class certification.

Finally, as to analysis of each of the class issues, the opinion does not qualify for publication under the grounds set forth in rule 976(b), California Rules of Court.

Based on the foregoing, we respectfully request depublication of the *Gattuso* opinion.

Thank you for your consideration of this request.

Very truly yours,
COHELAN & KHOURY

Timothy D. Cohelan

/MDS
enclosure
cc: Service List on All Counsel

Filed 10/27/05

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

FRANK GATTUSO et al., Plaintiffs and Appellants, v. HARTE-HANKS SHOPPERS, INC., Defendant and Respondent.	B172647 (Los Angeles County Super. Ct. No. BC247419)

APPEAL from orders of the Superior Court of Los Angeles County. Anthony J. Mohr, Judge. Affirmed.

Hollins Schechter, Andrew S. Hollins, Kathleen M. Kushi Carter and Jeffrey R. Gillette for Plaintiffs and Appellants.

Seyfarth Shaw, Raymond R. Kepner, Ann Haley Fromholz and John A. Van Hook for Defendant and Respondent.

Plaintiffs Frank Gattuso and Ernest Sigala brought an action on behalf of themselves and other employees of defendant Harte-Hanks Shoppers, Inc. (Harte-Hanks) seeking indemnification under Labor Code section 2802 for expenses incurred in using their personal automobiles in the discharge of their employment duties. Labor Code section 2802 (section 2802) provides in pertinent part: "(a) An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful."

Plaintiffs appeal from an order denying certification of this case as a class action and also from a prior order determining that section 2802 permits an employer to pay increased salaries or commissions instead of reimbursing the employee for actual automobile expenses incurred. We affirm both orders because we agree with the trial court's interpretation of section 2802 and conclude that the trial court did not abuse its discretion in denying plaintiffs' motion for class certification.

BACKGROUND

Harte-Hanks, a marketing company, distributes weekly over 8 million advertising publications in California, including the PennySaver and the California Shopper. The company is comprised of three business units: Southern California, Northern California, and the San Diego (or Sutton) unit. Harte-Hanks employs "Outside Sales Representatives" (OSR's) as well as "Inside Sales Representatives" (ISR's) to sell its products. The OSR's are required to drive their personal automobiles in the discharge of their duties. The ISR's sell many of the same products as the OSR's, but do so by telephone in the Harte-Hanks office rather than by visiting customers. Gattuso is an OSR and Sigala is a former OSR in Harte-Hanks's Southern California unit.

According to Harte-Hanks's president, Peter Gorman, the OSR's are paid higher base salary and commission rates than the ISR's in order to compensate the OSR's for automobile expenses. For example, the ISR's in the Santa Ana area, supervised by Deborah Glenny, earn, on the average, $11 per hour base salary and the OSR's earn $15

to $16 per hour base salary; the ISR's earn lower commissions than the OSR's. Michael Paulsin, Harte-Hanks's vice-president of finance, testified that the pay stubs of the OSR's do not "[break] out separately" the amount of compensation representing reimbursement for automobile expenses, but such reimbursement is included in the employee's total gross wages. Paulsin maintained that the increased compensation for the OSR's is more than adequate to compensate them for the use of their automobiles, but the company did not conduct any study to determine whether the increased compensation actually resulted in indemnification for all of the OSR's automobile expenses.

Robert Falk, Harte-Hanks's vice-president of marketing for the Southern California unit, testified that Harte-Hanks has to compete for OSR's with its competitors, so each of Harte-Hanks's regional sales managers, with the approval of the regional vice-president, has authority to set the compensation for the OSR's he or she manages.

The OSR's in the three units may negotiate a compensation plan and create an individualized expense reimbursement system. For example, in the Southern California unit, some OSR's are compensated solely by the commissions generated by the sales in their assigned territories. A few OSR's are compensated by the commissions generated by the sales of a "team" with whom they split their commission. And some OSR's earn a base salary plus commissions on the products they sell, and the base salary varies depending on the size of the OSR's territory and whether the territory is "new" or an "expansion" territory with many established Harte-Hanks's customers.

Gattuso and Sigala filed a class action complaint against Harte-Hanks for indemnification under section 2802 for expenses incurred by the OSR's in connection with the use of their automobiles to perform their job duties. After Harte-Hanks answered the complaint, plaintiffs filed a "proposed legal question for certification," whether section 2802 permits an employer to pay increased salaries or commissions instead of reimbursing the employee's actual expenses incurred in the discharge of the employee's duties. The trial court asked the parties to brief the following issue: "Does Labor Code section 2802 permit an employer to pay increased wages or commissions

instead of indemnifying actual expenses necessarily incurred in the discharge of an employee's duties?"

In its brief on the issue in the trial court, Harte-Hanks summarized the parties' positions: "Plaintiffs allege that [Harte-Hanks] has unlawfully failed to reimburse them, and the putative class, for the expense of using their automobiles in the course and scope of their employment as outside salespeople. They base their claim on Labor Code section 2802 . . . . [Harte-Hanks] denies that it has any such obligation and [in the alternative] alleges that it does, in fact, reimburse outside salespeople as a matter of policy for automobile-related expenses in the form of additional compensation. Plaintiffs, in turn, dispute that indemnification in the form of additional compensation is sufficient to comply with the requirements of section 2802."

After extensive briefing of the issue and oral argument, the court issued an April 5, 2002 "order regarding certified legal question" rejecting Harte-Hanks's argument that section 2802 does not require indemnification for the OSR's automobile expenses but accepting Harte-Hanks's argument that section 2802 permits an employer to pay increased salaries or commissions instead of reimbursing the employee for actual expenses necessarily incurred in the discharge of the employee's duties. The order provides in pertinent part: "Although there does not appear to be a case on point, a plain reading of subdivision (a), 'necessary expenditures or losses' in the 'direct consequence of the discharge of his or her duties' would require that all employee work-related expenses be reimbursed by the employer. The court, while not deferring to the [Division] of Labor Standards Enforcement ('DLSE') Interpretive Bulletin 84-7, agrees with the DLSE's interpretation that the plain language of section 2802 would require an employer to reimburse employees for work-related expenses, i.e. mileage reimbursement. [¶] Turning to the central issue, the court further finds that Labor Code section 2802 permits an employer to pay increased wages or commissions instead of indemnifying actual expenses necessarily incurred in the discharge of an employee's duties. The court does not defer to the [DLSE] in this regard; but after an independent legal analysis, the court agrees with the DLSE's conclusion as articulated in DLSE Interpretive Bulletin 84-7, that

'the rate of reimbursement can be that agreed to by the employer and employee or, if there is no such agreement, any reasonable amount.'"[1]

Plaintiffs then filed a motion for class certification seeking (1) to certify a plaintiff class defined as *all persons* currently or formerly employed by Harte-Hanks who utilized their automobiles in the discharge of their duties and were not reimbursed for the expenses incurred thereby after January 1, 1998, (2) to certify plaintiffs as the representatives of the class, and (3) to appoint plaintiffs' counsel as counsel for the class. At the time of the hearing, plaintiffs narrowed the class to the OSR's incurring expenses after January 1, 1998, and stated that there were about 1,500 such potential class members.

In preparation for the motion, plaintiffs deposed Paulsin, Falk, and other executives employed by Harte-Hanks, as well as an OSR from each of the 31 offices throughout California which employs OSR's. Plaintiffs' summary of the depositions of Gattuso, Sigala, and 31 other OSR's indicated that all of them incurred expenses related to the use of their automobiles in the performance of their job duties. Twenty-seven OSR's (including Gattuso and Sigala) testified that they were not reimbursed for their expenses, four OSR's testified that they were reimbursed at the rate of $25 per week, one OSR testified that she was reimbursed at the rate of $50 per week, and one OSR testified that he was reimbursed at the rate of $150 per month.

In opposition to the motion, Harte-Hanks argued that the class of OSR's lacked predominant common issues because the variety of compensation plans fractured the

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[1] In DLSE Interpretive Bulletin No. 84-7, the Labor Commissioner determined that "[u]nder Labor Code section 2802, an employer who requires an employee to furnish his/her own car or truck to be used in the course of employment would be obligated to reimburse the employee for the costs necessarily incurred by the employee in using the car or truck in the course of employment. The rate of reimbursement can be that agreed to by the employer and employee, or, if there is no such agreement, any reasonable amount." (Cal. Dept. of Industrial Relations, Div. of Labor Standards Enforcement, Interpretive Bull. No. 84-7, Jan. 8, 1985 rev. (DLSE Interpretive Bulletin No. 84-7).)

class into numerous subclasses, and the determination of whether any one OSR had been indemnified for automobile expenses required an individualized and complicated inquiry. Harte-Hanks maintained that the circumstances of each OSR were different because some OSR's drove 100 miles per day while others drove as few as five miles per day. In addition, the inquiry would require a comparison between the OSR's actual earnings and what the OSR would have earned under an ISR compensation plan. The difference between the commissions earned under the OSR's compensation plan and the commissions earned by an ISR generating the same revenue (that is "the Differential") is the amount intended to compensate OSR's for automobile and other expenses. The Differential must then be compared to the OSR's actual automobile expenses or to the OSR's actual mileage to determine if the OSR was reasonably compensated for automobile expenses. If the Internal Revenue Service's (IRS) standard mileage rate (which in 2001 was 34.5 cents per mile) is used as a proxy for actual automobile expenses, then the inquiry would require an analysis of whether the Differential reasonably compensated the OSR for the miles driven at the IRS standard mileage rate.

Harte-Hanks submitted a chart calculating the Differentials of 26 of the 31 OSR's deposed by plaintiffs. (The Differential analysis for the other OSR's could not be performed because Harte-Hanks could not locate records of the OSR's sales revenue.) The Differentials were based on commissions earned in 2001 or in the first quarter or the first two quarters of 2002. Of those 26 OSR's, 19 earned more in commissions as an OSR than an ISR producing the same revenue. Of the seven OSR's whose commissions as OSR's were less than those of ISR's, six were on a base salary plus commission compensation plan and the chart did not include any base salaries, so a comparison could not be made with respect to these six OSR's.

Harte-Hanks also opposed the motion for class certification on the ground that Gattuso and Sigala were not typical of the class and had interests antagonistic to many members of the class. Gattuso was on a sales team in an experimental sales arrangement different from almost all other OSR's. In addition, for almost all of the six years of his employment, Gattuso had earned only a "guarantee" because he was unable to sell

enough advertising products to generate commissions in excess of his guarantee. Harte-Hanks characterized Sigala as a "poor performer" who had received a warning for poor performance shortly before he resigned his employment in January 2000. Harte-Hanks submitted the declarations of about 28 OSR's who stated that they would suffer detriment if plaintiffs prevailed in this lawsuit and if Harte-Hanks required OSR's to submit weekly expense reports. A few of the 31 OSR's deposed by plaintiffs testified that they preferred Harte-Hanks's existing system with respect to expense indemnification and some OSR's made derogatory comments about this lawsuit.

After oral argument, the court denied the motion for class certification, determining that the case was inappropriate for treatment as a class action because the requirements of common questions of law or fact and of superiority were lacking. The court determined that plaintiffs did not show common questions of fact and law because the "claim for unpaid business expenses under [section 2802] turns on the determination of two issues: (1) whether each individual Harte-Hanks outside sales representative has an agreement about the manner in which he is compensated for expenses, or (2) whether the compensation paid to each individual sales representative is reasonable to compensate for business expenses incurred. The determination of whether there was a meeting of the minds and whether reimbursement was reasonable necessarily requires an individualized inquiry as to each outside sales representative. The requirement of commonality therefore is not met, and [plaintiffs' claims] for unpaid business expenses cannot be maintained as a class action."

The court further concluded that Sigala was not an adequate class representative because of a "disabling conflict between him and numerous absent class members" who are more successful in their jobs than Sigala and who "could be harmed if Harte-Hanks was forced to reimburse its outside sales representatives using an expense report and expense check system." Although Gattuso was determined to be an adequate class representative, the court concluded that his claim was not typical of the putative class members because he was compensated differently from most other OSR's in that he was on a sales team which covered multiple sales territories and was compensated based on

the sales of the entire team. The court determined, however, that plaintiffs established the requirements of ascertainability, numerosity, and adequacy of legal representation.

Plaintiffs appeal, challenging the trial court's underlying order interpreting section 2802 as well as the order denying class certification. The order denying class certification is appealable. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.) And the underlying order interpreting section 2802 is reviewable on this appeal because the first order "necessarily affects the . . . order appealed from" and "substantially affects the rights of a party." (Code Civ. Proc., § 906.)

DISCUSSION

A. Order Regarding Certified Legal Question

Plaintiffs contend that because Labor Code section 2804 (section 2804) prohibits waiver of the benefits of section 2802, the trial court "committed reversible error in holding that an employer and employee may have an agreement to waive Labor Code section 2802."[2] They also argue that section 2802 requires either reimbursement for actual expenses incurred by the employee or payment of a reasonable per-mile rate, and Harte-Hanks's alleged agreement to pay increased salaries or commissions is tantamount to a waiver of section 2802 because the increased compensation is taxed as ordinary income and unrelated to actual expenses or miles traveled. We disagree with both contentions.

First, the trial court did *not* hold that an employer and employee may agree to waive the provisions of section 2802. Nothing in the order on the certified legal question or in the record of the January 2002 hearing on the matter indicates that the court so held. To support their interpretation of the record, plaintiffs refer to a stray comment made by the trial court during the May 2002 hearing on the motion for class certification. But the

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[2] Section 2804 provides: "Any contract or agreement, express or implied, made by any employee to waive the benefits of this article or any part hereof, is null and void, and this article shall not deprive any employee or his personal representative of any right or remedy to which he is entitled under the laws of this State."

comment occurred in the context of a rather lengthy discussion between the court and the parties' attorneys about the issues in the case, and it is clear from the context of the entire discussion that the trial court did not change its prior ruling or hold that the benefits of section 2802 could be waived. The stray comment cannot be used to impeach the trial court's written order interpreting section 2802. (*Jespersen v. Zubiate-Beauchamp* (2003) 114 Cal.App.4th 624, 633 [judge's comments in oral argument may not be used to impeach the final order].)

Second, for reasons which we shall discuss, we determine that section 2802 permits an employer to pay increased salaries or commissions instead of reimbursing the employee for actual automobile expenses incurred or paying a reasonable mileage rate, and that such method of indemnification does not run afoul of the anti-waiver provision in section 2804.

The proper interpretation of a statute is a question of law, which we review de novo. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432.) "The function of the court in construing a statute 'is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted . . . .'" (*Ventura County Deputy Sheriffs' Assn. v. Board of Retirement* (1997) 16 Cal.4th 483, 492.) "We must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." (*People v. Coronado* (1995) 12 Cal.4th 145, 151.)

Section 2802, "which generally requires employers to indemnify their employees for losses incurred in the discharge of the employee's duties, shows a legislative intent that duty-related losses ultimately fall on the business enterprise, not on the individual employee." (*Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 74, fn. 24; *Grissom v. Vons Companies, Inc.* (1991) 1 Cal.App.4th 52, 60 [obvious purpose of section 2802 is "to protect employees from suffering expenses in direct consequence of doing their jobs"].)

Plaintiffs contend that Harte-Hanks's paying increased compensation to its OSR's to indemnify them for expenses incurred in using their automobiles in the course of their jobs does not satisfy section 2802. And plaintiffs argue that indemnification for expenses under section 2802 cannot take the form of taxable, ordinary income unrelated to the expenses actually incurred. But on its face, the statute does not specify any particular method by which the employer must indemnify employees for necessary expenditures or losses. And nothing in the statute indicates that the Legislature intended to create one exclusive method for such indemnification.

The Industrial Welfare Commission (IWC), the state agency empowered to formulate regulations (known as wage orders) governing employment in California (*Morillon v. Royal Packing Co.* (2000) 22 Cal.4th 575, 581 (*Morillon*)), has not promulgated a regulation specifying any particular method or methods to satisfy the expense indemnification requirement of section 2802.[3] And the DLSE, the state agency empowered to enforce California's labor laws, including IWC wage orders (*Morillon, supra*, 22 Cal.4th at p. 581), has not promulgated a rule or policy prohibiting Harte-Hanks from indemnifying automobile expenses by paying increased salaries or commissions.

To support their contention that increased compensation does not satisfy section 2802, plaintiffs rely on *Shotgun Delivery, Inc. v. U.S.* (9th Cir. 2001) 269 F.3d 969 (*Shotgun*). *Shotgun* did not deal with indemnification under section 2802, but with the issue of whether certain compensation paid by a messenger and courier service to its employees constituted wages subject to federal withholding and employment taxes as opposed to business expenses exempt from such withholding and employment taxes under regulations of the United States Department of the Treasury. Shotgun's drivers

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[3] Although the Legislature defunded the IWC effective July 1, 2004, its wage orders remain in effect. (*Huntington Memorial Hospital v. Superior Court* (2005) 131 Cal.App.4th 893, 902, fn. 2.)

were paid on a commission basis and received 40 percent of the delivery charges for their jobs. But the 40 percent was paid in two separate checks: one check compensated the driver at the minimum wage for the hours worked, and this check withheld the appropriate employment taxes; a second check was issued which, when added to the first check, amounted to 40 percent of the driver's delivery charges. Shotgun considered the second check (the "mileage check") to be compensation to the drivers for the use of their vehicles and did not deduct employment taxes.

In *Shotgun*, the Ninth Circuit upheld the assessment by the IRS of delinquent employment taxes against Shotgun, agreeing with the IRS and the district court that Shotgun's method of mileage reimbursement did not qualify for treatment as a tax-exempt "accountable plan" under applicable regulations. To be eligible for favorable tax treatment, "accountable plans" required employees to substantiate their deductible expenses and to refund any reimbursement in excess of eligible expenses. The Ninth Circuit concluded that "Shotgun's system of 'mileage reimbursement' was not designed to simply reimburse the drivers for their actual or reasonably expected mileage expenses. Rather, the evidence suggests that the plan's primary purpose was to treat the least amount possible of the drivers' 40% commission as taxable wages. We hold that reimbursements under such a plan do not meet the requirements of 26 C.F.R. § 1.62–2(d)." (*Shotgun*, *supra*, 269 F.3d at p. 973.)

That Shotgun's compensation plan was properly treated as wages, and not as a tax-exempt "accountable plan" for purposes of assessment of employment taxes under federal law and regulations, does not resolve the issue of whether an employer may comply with section 2802 by paying increased compensation.

We conclude that section 2802 does not preclude Harte-Hanks from indemnifying its OSR's for their automobile expenses by paying increased compensation, even if other provisions of law may treat that compensation as taxable wages. A violation of section 2802 would occur only if the increased compensation was insufficient to indemnify the OSR's for the automobile expenses incurred in the discharge of work-related duties. Any taxes the OSR's are obligated to pay on the increased compensation should be taken into

account in determining whether Harte-Hanks is indemnifying the OSR's for all of their automobile expenses.

Plaintiffs characterize the DLSE's position on indemnification for automobile expenses under section 2802 as requiring either one of two methods of indemnification: (1) actual automobile expense reimbursement or (2) payment of a reasonable per-mile rate, with the IRS rate being presumptively reasonable. But we find nothing in the DLSE publications brought to our attention by the parties which limits the methods by which an employer may indemnify employees for automobile expenses under section 2802 or which expressly disapproves of Harte-Hanks' method of indemnification.

DLSE Interpretive Bulletin No. 84-7, *supra*, provides in pertinent part that an employer who requires an employee to furnish an automobile to be used in the course of employment is obligated to reimburse the employee for the costs necessarily incurred thereby, but the "rate of reimbursement can be that agreed to by the employer and employee, or, if there is no such agreement, any reasonable amount." A July 1993 DLSE "Update" states, "The Division takes the position that the payment of a reasonable mileage reimbursement covers all reasonable operating costs incurred by the employee in the operation of a personal vehicle for business purposes. The DLSE accepts the mileage reimbursement used by the IRS as reasonable. . . . [¶] In the absence of an agreement to pay a reasonable mileage reimbursement, the employer would be required to reimburse the employee for the actual costs incurred in operating the vehicle while that vehicle was being used in the service of the employer." (Cal. Dept. of Industrial Relations, Div. of Labor Standards Enforcement, Update, July 1993, vol. 1, No. 3.)

A September 12, 2000 DLSE letter states that the policy expressed in the July 1993 Update remained the DLSE's policy regarding mileage. The September 2000 letter also reiterates that "[i]f there is no specific agreement as to the mileage rate, the IRS rate is considered reasonable and is used. Otherwise, the employer is responsible for the actual costs incurred in operating the vehicle." (Cal. Dept. of Industrial Relations, Div. of Labor Standards Enforcement, letter of Deputy Labor Comr. Patricia Huber, Sept. 12, 2000.)

The foregoing DLSE publications do not expressly or by implication foreclose an employer from paying increased compensation to accomplish such indemnification. Thus, our interpretation of section 2802 is consistent with the policies expressed in the DLSE publications.

Plaintiffs fault the trial court for citing in its order DLSE Interpretive Bulletin No. 84-7, *supra*, which contains a policy that was adopted without compliance with the Administrative Procedure Act (APA; Gov. Code, § 11340 et seq.). A DLSE rule or policy of general application is a regulation within the meaning of the APA, and if the policy was adopted without compliance with the APA procedures, it is void and entitled to no deference. (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 572, 576 (*Tidewater*).) But the trial court stated that, notwithstanding the consistency between its interpretation of section 2802 and that of the DLSE, it independently arrived at its interpretation and did not defer to the DLSE. This was proper.

"If, when [the court] agreed with an agency's application of a controlling law, we nevertheless rejected that application simply because the agency failed to comply with the APA, then we would undermine the legal force of the controlling law. Under such a rule, an agency could effectively repeal a controlling law simply by reiterating all its substantive provisions in improperly adopted regulations. . . . Courts must enforce [IWC] wage orders just as they would if the DLSE had never adopted its policy." (*Tidewater*, *supra*, 14 Cal.4th at p. 577.)

Because plaintiffs fail to establish any error, we affirm the trial court's order regarding the certified legal question construing section 2802. By our holding, we do not express any opinion as to whether Harte-Hanks has actually indemnified any of its OSR's for all of his or her automobile expenses via increased compensation, but only that section 2802 does not prevent Harte-Hanks from doing so in this manner.

B. Order Denying Class Certification

"Code of Civil Procedure section 382 authorizes class actions 'when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court . . . .' The party

seeking certification has the burden to establish the existence of both an ascertainable class and a well-defined community of interest among class members. [Citations.] The 'community of interest' requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." (*Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326 (*Sav-on*).) "A trial court ruling on a certification motion determines 'whether . . . the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.'" (*Ibid.*)

"'Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification. . . . [Accordingly,] a trial court ruling supported by substantial evidence generally will not be disturbed "unless (1) improper criteria were used [citation]; or (2) erroneous legal assumptions were made . . . ."'" (*Sav-on*, *supra*, 34 Cal.4th at pp. 326–327.) We review the trial court's ruling for abuse of discretion. (*Id.* at p. 326.)

Plaintiffs challenge the trial court's determinations that common legal and factual issues do not predominate, that plaintiffs do not have claims typical of the class, and that a class action is not a superior procedure to resolve the case.

With respect to the issue of common questions of law and fact, plaintiffs argue that the trial court's order interpreting section 2802 "was the linchpin in the denial of class certification," and that if we reverse the order on the certified legal question, "there would be no separate inquiry because the paramount liability issue would be common to all [OSR's], i.e., the refusal of defendants to provide actual expense reimbursement pursuant to section 2802."

Plaintiffs do not discuss the issue of whether they can meet the community of interest requirement under the trial court's and our interpretation of section 2802. Under that interpretation, the issue is whether Harte-Hanks has increased compensation

sufficient to indemnify the OSR's for their automobile expenses within the meaning of section 2802. The trial court reasonably concluded that a resolution of this issue entails an individualized inquiry with respect to each OSR. Plaintiffs do not establish that this conclusion is not supported by substantial evidence.

With respect to the issue of typicality, plaintiffs argue that there is a strong identity of interest between them and the class, but the record is replete with evidence showing that there is disagreement between the named plaintiffs and potential class members over the instant lawsuit. Many of the potential class members do not believe they are harmed by Harte-Hanks's policy of paying increased compensation to cover automobile expenses. And the circumstances of the two plaintiffs are not typical of the majority of the OSR's. Accordingly, substantial evidence supports the trial court's finding that the plaintiffs' claims are not typical of those of the class.

Regarding the trial court's finding on the element of superiority, plaintiffs fail to address the common as opposed to individual issues which arise under the trial court's interpretation of section 2802. Thus, plaintiffs fail to establish that substantial evidence does not support the trial court's finding that class certification does not advance the goal of efficiency that underlies the class action procedure.

For all of the foregoing reasons, we conclude that the trial court did not abuse its discretion in denying plaintiffs' motion for class certification.

DISPOSITION

The order denying class certification and the order regarding the certified legal question are affirmed. The parties are to bear their own costs on appeal.

CERTIFIED FOR PUBLICATION.

MALLANO, J.

We concur:

SPENCER, P. J.

ROTHSCHILD, J.

PROOF OF SERVICE

I am a resident of the State of California, over the age of 18 years, and not a party to the within action. My business address is Cohelan & Khoury, 605 "C" Street, Suite 200, San Diego, California 92101-5305.

On December 13, 2005, I served the foregoing document described as REQUEST FOR DEPUBLICATION on the interested parties in this action by placing a true copy thereof in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

I then served each document in the manner described below:

[ ] **BY MAIL**: I placed each for deposit in the United States Postal Service this same day, at my business address shown above, following ordinary business practices.

[ ] **BY FAX**: I transmitted the foregoing document(s) by facsimile to the party identified above by using the facsimile number indicated. Said transmission(s) were verified as complete and without error.

[XX] **BY UNITED PARCEL SERVICE**: I placed each envelope for deposit in the nearest United Parcel Service drop box for pick up this same day and for "next day air" delivery.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed December 13, 2005 at San Diego, California.

Amber Worden

Amber Worden

SERVICE LIST

Gattuso v. Harte-Hanks, Inc.
B172647

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